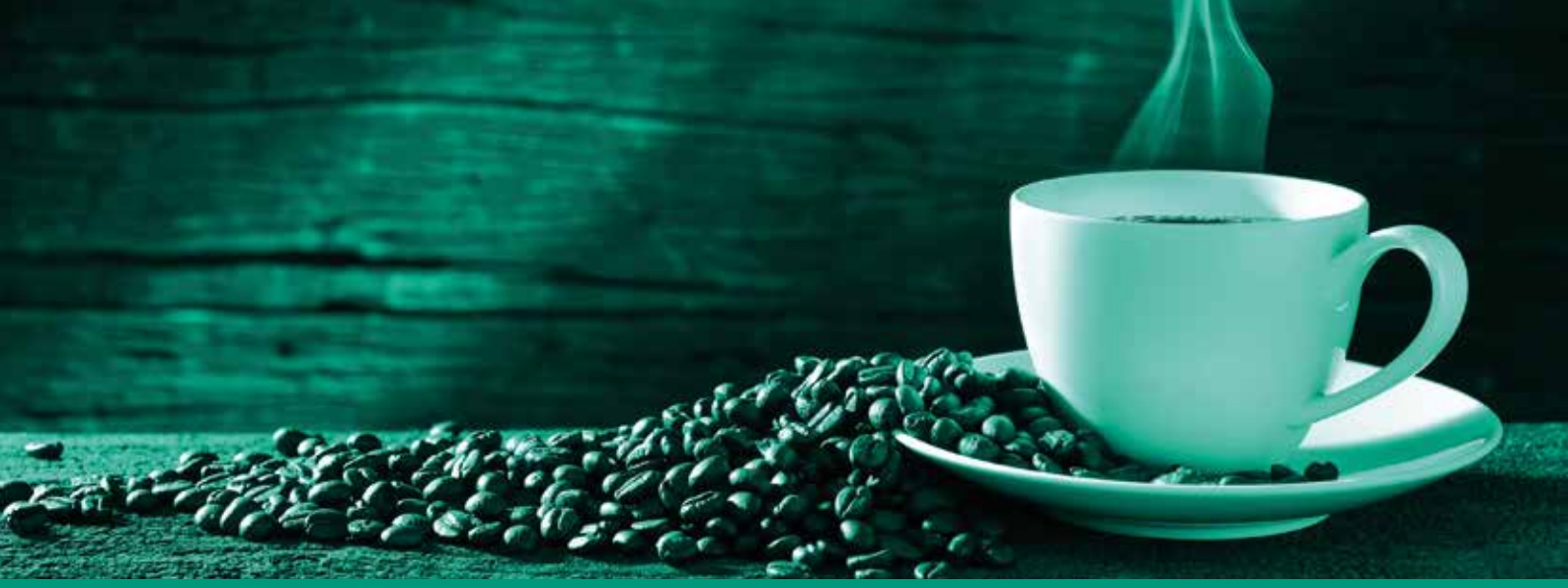

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The International Comparative Legal Guide to:

Franchise 2018

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A practical cross-border insight into franchise law

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1 Relevant Legislation and Rules Governing Franchise Transactions

1.1 What is the legal definition of a franchise?

In Canada, six of the 13 provinces and territories have adopted franchise specific legislation: Alberta; British Columbia; Manitoba; New Brunswick; Ontario; and Prince Edward Island. Each provincial franchise statute defines a 'franchise' in a similar manner to include the following key elements: the grant of a right to sell or distribute the goods and services of the franchisor in return for (indirect or direct) payment or ongoing payments where: (i) the franchisee is also granted the right to use the trademark (or other intellectual property) of the franchisor and the franchisor exercises significant control or offers significant assistance; or (ii) representational or distribution rights are granted together with location assistance (e.g. securing retail outlets). The definition is broad and can in some circumstances bring within its ambit business arrangements that would not typically qualify as "franchise" arrangements.

1.2 What laws regulate the offer and sale of franchises?

In Canada, the offer and sale of franchises is regulated provincially and not at the federal level. As stated above, six provinces have enacted franchise specific legislation which sets out the legal requirements with respect to offering and selling franchises. Provincial franchise statutes are remedial and are intended to level the perceived imbalance of power in a franchisor-franchisee relationship. Each of the six provincial franchise statutes, among other things:

- requires a franchisor to provide a prospective franchisee with a disclosure document before the prospective franchisee signs the franchise agreement or makes any payment to the franchisor. Canadian franchise legislation specifies the content required in such disclosure document;
- imposes upon each party a duty of fair dealing in the performance and enforcement of the franchise agreement and, with the exception of Alberta, a duty to act in good faith and in accordance with reasonable commercial standards. A breach of such duty provides the innocent party with a right of action for damages;
- entitles a franchisee to associate with other franchisees and to form or join an organisation of franchisees. A franchisee has a right of action for damages against a franchisor that tries to penalise its franchisees from associating/organising;
- allows a franchisee to rescind the franchise agreement if the franchisor failed to provide a disclosure document (or statement of material change) within the time required, or if the contents did not meet the requirements, or if the franchisor never provided the disclosure document;
- entitles a franchisee to a right of action for damages if a franchisee suffers a loss because of a misrepresentation contained in the disclosure document (or statement of material change); and
- includes an anti-waiver provision which deems any purported waiver or release by a franchisee of a right given under the applicable statute to be void.

The offer and sale of franchises is also subject to laws applicable to all contracts generally.

1.3 If a franchisor is proposing to appoint only one franchisee/licensee in your jurisdiction, will this person be treated as a "franchisee" for the purposes of any franchise disclosure or registration laws?

Generally speaking, the answer is "yes". Having said that, there is an exception in each provincial statue (other than Alberta) for the granting of a single licence with respect to a specific trademark (or other specific intellectual property) where no other licences of that general nature and type have been granted.

Where the single grant is to a prospective master franchisee, the question arises as to whether the provincial franchise statutes operate to deem such arrangement a "franchise" for the purposes of disclosure requirements. While this issue has not been formally addressed by the courts, the practice in Canada is to provide disclosure as though it is required. The rationale for this approach stems from language found in several provincial statutes that are stated to apply if the franchise is to be operated "partly or wholly" in the province.

1.4 Are there any registration requirements relating to the franchise system?

There are no franchise specific registration requirements in Canada. More particularly, there is no requirement for registration before a franchisor can offer franchises for sale, and there is no requirement that disclosure documents or marketing materials be registered.

Having said that, there are non-franchise specific registration requirements that apply to franchisors and to franchisees pursuant to, for example, intellectual property laws, corporate laws, employment laws, and potentially other specific laws that may apply, such as environmental laws and laws of regulated industries.

1.5 Are there mandatory pre-sale disclosure obligations?

Disclosure obligations form the backbone of franchise legislation in the regulated Canadian provinces.

A franchisor must provide a prospective franchisee with a disclosure document containing all required information contained in one document and delivered at one time at least 14 days before the earlier of either (i) the franchisee signing a franchise agreement or any other agreement forming part of the franchise, and (ii) the franchisee paying any fee or consideration to the franchisor. The disclosure document must include all "material facts". In addition to defining the term "material fact", each of the provincial statutes prescribes specific information (some of which is contained in regulations) that must be disclosed. The prescribed information includes: financial statements; copies of all proposed franchise agreements and other agreements; the business background of the franchisor and the directors and officers; certain legal proceedings and insolvency history of the franchisor and its directors and officers; full financial disclosure including costs necessary to establish the franchise; and ongoing costs payable by the franchisee. The franchisor has a continuing obligation to update the franchisee with any material changes to the disclosure up until the franchisee signs a franchise agreement or pays fees/consideration to the franchisor.

Each provincial statue contains a number of limited exemptions that may apply to specific cases to absolve franchisors from disclosure requirements. Such exemptions are very similar from one provincial statute to the other.

If a franchisee suffers a loss because of a misrepresentation contained in the disclosure document or the statement of material change, a franchisee has a right of action for damages. Additionally, a franchisee can rescind the franchise agreement (i) within 60 days of receiving the disclosure document if the contents of the disclosure document do not meet the disclosure requirements, or (ii) within two years after entering into the agreement if the franchisor never provided a disclosure document, or if there are deficiencies so material that the disclosure document is considered not to be a disclosure document at all.

1.6 Do pre-sale disclosure obligations apply to sales to sub-franchisees? Who is required to make the necessary disclosures?

The definition of "franchisor" in each of the provincial statutes includes a "sub-franchisor". As a result, the obligation to provide pre-sale disclosure applies to sub-franchisors. The entity granting the franchise has the obligation to provide the pre-sale disclosure. The pre-sale disclosure may be more extensive for sub-franchisors, as it would have to include a reasonable amount of information regarding the arrangements between the sub-franchisor and the franchisor, in order to make full and complete disclosure.

1.7 Is the format of disclosures prescribed by law or other regulation, and how often must disclosures be updated? Is there an obligation to make continuing disclosure to existing franchisees?

The precise format and content of franchise disclosure document varies slightly from province to province. While there is no exact form prescribed by the provincial statutes, some franchisors have adopted the practice of creating a disclosure document that satisfies the requirements set out in each of the six provincial statutes (which is then used across all of Canada).

The franchise disclosure document must be current and up to date each time it is provided to a prospective franchisee (there are no annual updating requirements as in registration jurisdictions). However, information pertaining to the advertising fund, closures in the last fiscal year and last three fiscal years, as well as the financial statements of the franchisor, must be updated on an annual basis.

There is no obligation to make continuing disclosure to existing franchisees under any of the current provincial franchise statues.

1.8 Are there any other requirements that must be met before a franchise may be offered or sold?

Apart from compliance with general principles of law, and the franchise specific provincial statutes and regulations, there are no other legal requirements that must be satisfied before a franchise may be offered or sold in Canada.

1.9 Is membership of any national franchise association mandatory or commercially advisable?

While not mandatory, there are commercial benefits to being a member of the Canadian Franchise Association ("CFA"), the only national trade association serving the franchise industry in Canada, including heightened credibility (in part arising from the requirement to comply with the CFA's Code of Conduct), educational sessions, as well as networking opportunities.

1.10 Does membership of a national franchise association impose any additional obligations on franchisors?

The CFA has a Code of Conduct that its members are required to abide by. Some of the requirements include: (i) compliance with franchise legislation, including disclosure requirements; (ii) providing guidance and support to franchisees to help them in their business; (iii) encouraging franchisees to obtain independent legal advice with regards to the franchise agreement or any disputes that arise; and (iv) to resolve disputes amicably and in good faith, among other obligations that promote the continued success of franchisees.

1.11 Is there a requirement for franchise documents or disclosure documents to be translated into the local language?

The predominant language in Canada is English, and franchise documents are generally prepared in English. Having said that, in Quebec, the Charter of the French Language requires that franchise documents be prepared in French where they are to be used in Quebec unless the parties expressly agree that another language be used (which is not uncommon) which is effected by adding the following language to the document: "*The parties to this agreement acknowledge having required that this agreement as well as all notices, documents or agreements related to this agreement be drafted in English. Les parties aux présentes reconnaissent avoir exigé que la présente convention ainsi que tous avis, documents ou ententes s'y rapportant soient rédigésen Anglais*."

2 Business Organisations Through Which a Franchised Business can be Carried On

2.1 Are there any foreign investment laws that impose restrictions on non-nationals in respect of the ownership or control of a business in your jurisdiction?

International franchisors must be aware of the *Investment Canada Act*, which states as its purpose: "to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments…that could be injurious to national security". The *Investment Canada Act* opens up any cross-border franchising to potential review. However, the minimum threshold of investment for the operation of the statute is $5,000,000.

There are also corporate and tax law implications that must be considered that may mandate that a certain amount of directors or shareholders be Canadian residents.

2.2 What forms of business entity are typically used by franchisors?

Franchisors typically use one or more corporations to conduct their franchise operations, although the use of limited partnerships and unlimited liability corporations is not uncommon. International franchisors typically enter the Canadian market in one of three ways: (i) by incorporating a subsidiary in Canada, which is owned by the foreign parent; (ii) by using a Canadian branch or division; or (iii) granting franchises directly from their foreign entity, without incorporating in Canada. Each approach has significantly different tax consequences and the best structure for one franchisor may not be ideal for another.

2.3 Are there any registration requirements or other formalities applicable to a new business entity as a pre-condition to being able to trade in your jurisdiction?

Principally, the requirements involve properly incorporating and organising a corporation (or establishing a limited partnership), obtaining appropriate extra-provincial and business name registrations, if applicable, and registering certain tax programme accounts (i.e. GST/HST and payroll accounts), if applicable. However, depending on the type of business to be operated, there may be additional licences and permits that need to be obtained.

3 Competition Law

3.1 Provide an overview of the competition laws that apply to the offer and sale of franchises.

While the sale of franchises is generally not affected by Canadian competition law, the Canadian *Competition Act* sets out certain practices that are reviewable by the Competition Tribunal, upon application by the Commissioner. Matters reviewable include: abuse of a dominant position; mergers; price maintenance; delivered pricing; refusal to deal; refusal to supply by foreign parties; consignment selling; exclusive dealing; tied selling; market restriction; and misleading advertising and trade practice matters.

The *Competition Act* also sets out certain criminal offences and allows for the recovery of damages for persons injured by the criminal anti-competitive activities of others. Criminal matters include: conspiracy bid rigging; pyramid and referral selling; telemarketing; and certain misleading advertising and trade practice matters.

3.2 Is there a maximum permitted term for a franchise agreement?

There are no restrictions on the maximum term permitted for franchise agreements. The typical term for franchise agreements in Canada ranges between five and 15 years.

3.3 Is there a maximum permitted term for any related product supply agreement?

There are no restrictions on the maximum term permitted for product supply agreements.

3.4 Are there restrictions on the ability of the franchisor to impose minimum resale prices?

A franchisor must always be cognisant of the price maintenance provisions in the Competition Act. Imposing a minimum resale price may become a reviewable event under the *Competition Act* if it results in an adverse effect on competition. It is not always clear what might constitute an adverse effect, but the Competition Bureau defined it in 2014 as an effect that is likely to "create, preserve or enhance the market power" of a supplier of goods and services.

3.5 Encroachment – are there any minimum obligations that a franchisor must observe when offering franchises in adjoining territories?

There are no specific statute-based obligations that a franchisor must observe in such circumstances. However, franchisors are required to disclose their policies regarding the proximity of new franchises to existing franchises.

3.6 Are in-term and post-term non-compete and non-solicitation of customers covenants enforceable?

Non-compete and non-solicit clauses are enforceable to the extent they do not create an unreasonable restraint on trade, especially relating to the geographical extent and duration of the restriction. A Canadian court will not re-write, write down or otherwise modify a restrictive covenant in order to make it reasonable and enforceable, but rather will either uphold or strike down the covenant in its entirety. As a result, these clauses should be written no more broadly than necessary in order to protect the franchisor's interests.

4 Protecting the Brand and other Intellectual Property

4.1 How are trade marks protected?

Trademarks in Canada are protected by common law and federal legislation, the *Trademark Act*. The *Trademark Act* defines a trademark as a "mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured,

sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others, a certification mark, a distinguishing guise or a proposed trademark". While trademarks do not have to be registered to be afforded protection, registration strengthens the protection across Canada, and in the province of Quebec enables the use of any English only terminology that is a registered trade mark (provided that no French version of the trade mark has been registered and that a generic description of the goods and services is included in French).

4.2 Are know-how, trade secrets and other business-critical confidential information (e.g. the Operations Manual) protected by local law?

Canadian law provides protection for all forms of intellectual property. Having said that, not all 'know-how' falls within a category of intellectual property in Canada. Franchisors can protect their trade secrets and other business-critical confidential information through contractual provisions and consistent confidential treatment, practices and the enforcement of such confidential information.

4.3 Is copyright (in the Operations Manual or in proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement) protected by local law?

Original works are granted copyright protection automatically by law, without a need to register the work. Registration is helpful in establishing what work is protected and who owns that work. Such protection would potentially apply to the contents of operations manuals and any proprietary software (provided it meets the copyright criteria). The presumption in Canada is that the owner of the copyright is the individual who created the work. A franchisor can maintain ownership of the copyright work, and such ownership is not disturbed by licensing it to franchisees. Franchisors are also permitted to restrict the use of the work to certain activities.

5 Liability

5.1 What are the remedies that can be enforced against a franchisor for failure to comply with mandatory disclosure obligations? Is a franchisee entitled to rescind the franchise agreement and/or claim damages?

A franchisee can bring an action for damages or rescission for non-compliance with mandatory disclosure obligations. New Brunswick's *Franchises Act* provides that a party to a franchise agreement may, in the event of a dispute with another party to such agreement, trigger a mandatory alternative dispute resolution mechanism (mediation). Instituting one of these actions does not, however, preclude any party to such franchise agreement from pursuing other recourses available under contract or common law.

Rescission

Each of the six provincial franchise statutes (other than *Alberta's Franchises Act*) provides the franchisee with a right to rescind the franchise agreement without penalty or obligation: (a) if the franchisor failed to provide disclosure document or a statement of material change within the prescribed time, or if the contents of the disclosure document do not satisfy statutory requirements, and the franchisee rescinds within 60 days of the late or deficient disclosure; and (b) for 'absence of disclosure' no later than two years after entering into the franchise agreement.

In either case, within 60 days of the effective date of rescission the franchisor must:

- purchase from the franchisee any remaining inventory, supplies and equipment purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee, and refund any other money paid by the franchisee to the franchisor; and
- compensate the franchisee for the difference between any losses incurred in acquiring, setting up and operating the franchise, and any amounts paid or refunded pursuant to the preceding paragraph.

In Alberta, if a franchisor fails to provide the disclosure document as required under the *Alberta Franchises Act*, the franchisee is entitled to rescind the franchise agreement by giving a cancellation notice to the franchisor by the earlier of 60 days after receiving the disclosure document or two years after the grant of the franchise. The franchisor does not have an obligation to purchase any of the franchisee's assets under the *Alberta Franchises Act* but must instead, within 30 days after receiving a cancellation notice, compensate the franchisee for any net losses incurred by the latter in acquiring, setting up and operating the franchised business.

Damages

Each of the six provincial franchise statutes (other than the *Alberta Franchises Act*) provide that if a franchisee suffers loss because of a misrepresentation contained in the disclosure document or in a statement of a material change or as a result of the franchisor's failure to comply with any disclosure requirements, the franchisee has a right of action for damages against the franchisor, the franchisor's broker (if any), the franchisor's associates, every person who signed the disclosure document or statement of material change (and, under the Ontario *Arthur Wishart Act (Franchise Disclosure), 2000*, the franchisor's agent), all of whom are jointly and severally liable. Under the *Alberta Franchises Act*, a franchisee who suffers a loss resulting from a misrepresentation contained in a disclosure document has a right of action for damages against the franchisor and every person who signed the disclosure document, on a joint and several basis.

5.2 In the case of sub-franchising, how is liability for disclosure non-compliance or for misrepresentation in terms of data disclosed being incomplete, inaccurate or misleading allocated between franchisor and master franchisee? If the franchisor takes an indemnity from the master franchisee in the Master Franchise Agreement, are there any limitations on such an indemnity being enforceable against the master franchisee?

The sub-franchisor is responsible for its own misrepresentations in disclosure documents and compliance with the relevant franchise legislation. An indemnity will be invalid to the extent that it provides for the release or waiver of obligations owed by the franchisor to its master franchisee under the Canadian franchise legislations, but is otherwise enforceable.

5.3 Can a franchisor successfully avoid liability for pre-contractual misrepresentation by including disclaimer clauses in the franchise agreement?

Any covenants which have the effect of waiving one or more rights of franchisees, or releasing a franchisor of its obligations to franchisees, under the various provincial franchise statutes are void. As such, a franchisor cannot avoid liability for pre-contractual misrepresentation as this is a protection afforded to franchisees under

the various provincial franchise statutes. In Quebec, a contractual disclaimer will generally be enforceable except in cases of fraud or intentional or gross fault but, in the context of a franchise agreement that is characterised as a contract of adhesion, it is possible that such clauses may be considered abusive and unenforceable in certain circumstances.

5.4 Does the law permit class actions to be brought by a number of allegedly aggrieved claimants and, if so, are class action waiver clauses enforceable?

Each of the six provincial franchise statutes specifically provide for franchisees' rights to associate. However, a contract may contain provisions which can curtail the right of franchisees to pursue class actions. In addition, in the presence of a mandatory arbitration clause, class action waivers have been given effect by Canadian courts.

6 Governing Law

6.1 Is there a requirement for franchise documents to be governed by local law? If not, is there any generally accepted norm relating to choice of governing law, if it is not local law?

Any provision of a franchise agreement that attempts to restrict the application of the relevant franchise statute is void. In provinces and territories that do not have franchise legislation, Canadian courts will generally recognise and uphold the parties' choice of foreign governing law, provided that there is a sufficient nexus to the parties' relationship. However, a choice of foreign governing law made with a view to avoiding the consequences of the applicable provincial laws of any Canadian jurisdiction will generally be considered invalid. Furthermore, where the applicable law is that of any province in Canada, the Vienna Convention on the International Sale of Goods will automatically apply in respect of sales of goods by foreign franchisors who are nationals of any other signatory nation, unless expressly set aside by the parties in the contract.

6.2 Do the local courts provide a remedy, or will they enforce orders granted by other countries' courts, for interlocutory relief (injunction) against a rogue franchisee to prevent damage to the brand or misuse of business-critical confidential information?

Canadian courts have well developed remedies for interlocutory relief. Foreign judgments are typically recognised in Canada if they are rendered in a court with proper jurisdiction and provide for monetary awards. Conversely, non-monetary foreign orders, such as an injunction, are unlikely to be recognised and enforced in Canada. Canada is a signatory party of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As a result, there are fewer defences to enforcement of a foreign arbitral award than to that of a foreign judgment. Canada is also a signatory to the UNCITRAL Arbitration Rules and both the federal and provincial governments have adopted substantially similar legislation.

7 Real Estate

7.1 Generally speaking, is there a typical length of term for a commercial property lease?

Terms of a commercial property lease typically range between five and 15 years, with terms of at least 10 years being typical for established brands. Renewal rights for additional periods of between five and 10 years are not uncommon. Among other things, factors such as the strength of the franchise brand, the location and the type of shopping centre influence lengths of terms.

7.2 Is the concept of an option/conditional lease assignment over the lease (under which a franchisor has the right to step into the franchisee/tenant's shoes under the lease, or direct that a third party (often a replacement franchisee) may do so upon the failure of the original tenant or the termination of the franchise agreement) understood and enforceable?

These concepts are understood, typical and enforceable in Canada. In addition, it is not uncommon for franchisors to be the head tenant (under a head lease) with broad rights to sublet the premises to a franchisee.

7.3 Are there any restrictions on non-national entities holding any interest in real estate, or being able to sub-lease property?

There are few restrictions imposed on non-national entities with respect to holding interest in real estate or sub-leasing property in Canada. These restrictions, however, are mostly related to agricultural or cultural land.

7.4 Give a general overview of the commercial real estate market. Specifically, can a tenant reasonably expect to secure an initial rent free period when entering into a new lease (and if so, for how long, generally), or are landlords demanding "key money" (a premium for a lease of a particular location)?

Landlords may actively favour tenants with an international reputation or top-tier Canadian brands in highly populated urban shopping centres given the lower vacancy rates in those areas. That market is typically measured by discrete urban centres, given the concentration of the Canadian population in major cities, with lower vacancy rates in high-end shopping centres and other desirable locations.

Although always subject to the law of supply and demand, we have not observed tenants of such calibre being asked for key money or given initial rent-free periods covering actual retail operations, though rent-free fixturing periods of between one and six months, advances by landlords for tenant improvements and, at times, additional scope for a landlord's work have been observed. One must assume, however, that each of the latter are factored into the rental rates being charged.

8 Online Trading

8.1 If an online order for products or request for services is received from a potential customer located outside the franchisee's exclusive territory, can the franchise agreement impose a binding requirement for the request to be re-directed to the franchisee for the territory from which the sales request originated?

Franchisors may grant exclusive territorial rights to franchisees, including with respect to online channels. Accordingly, a franchisee with exclusivity for the province of Ontario may be contractually

required to redirect an online order received from a customer residing in Quebec to the franchisee with exclusivity over the province of Quebec. The franchisor can include particular terms and conditions around how such transfers take place and may have a role in the enforcement of these rights.

8.2 Are there any limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement?

There are no limitations imposed on franchisors from requiring franchisees to assign local domain names upon termination or expiry of the franchise agreement. However, any assignment obligation should be expressly included in the franchise agreement. Best practice involves having franchisees sign an assignment in advance (at the time that the franchise agreement is signed) which takes effect upon termination or expiry.

9 Termination

9.1 Are there any mandatory local laws that might override the termination rights that one might typically expect to see in a franchise agreement?

There are no statutory restrictions on the parties' rights to contractually set out their agreed termination rights. However, a franchisor, when enforcing a right of termination of a franchise agreement, must abide by the implied covenant of fair dealing under the provincial franchise statutes and at common law. A franchisor does not have a right to unilaterally terminate a franchise agreement without cause and, if a franchisor does so, it can be liable for damages to the franchisee. Typically in Canada, the franchise agreement does not contain provisions allowing a franchisee to terminate a franchise agreement before its expiry date. As a result, any right to early termination by a franchisee will only arise where the franchisor significantly breaches the franchise agreement.

10 Joint Employer Risk and Vicarious Liability

10.1 Is there a risk that a franchisor may be regarded as a joint employer with the franchisee in respect of the franchisee's employees? If so, can anything be done to mitigate this risk?

The concept of 'common employer' has been recognised in Canada. This concept considers whether two companies really function as a single integrated unit in order to attribute liability. The concept is most often cited in wrongful dismissal cases by employees who allege to being employed by a group of entities. Whether a common employment relationship exists depends upon whether there is a sufficient degree of relationship between the different legal entities for the purpose of determining liability for obligations owed to employees. The joint employer status is distinct from common employer with the former being much broader; most franchise relationships fall under the joint employer principle.

The common employer principle may extend to franchisor liability in connection with human rights and discrimination issues. To mitigate the risk of this occurring, each franchisee must operate as a truly independent and distinct entity from its franchisor (and such arrangement should be clearly reflected in the franchise agreement and related documents). Additionally, it is also crucial to ensure that there exists no common control or direction emanating from the franchisor greater than that which is necessary to maintain the integrity of the brand.

Moreover, an effective way to limit the chances of being a common employer is by setting best practice standards and avoiding exercising direct authority over franchisees' employees.

10.2 Is there a risk that a franchisor may be held to be vicariously liable for the acts or omissions of a franchisee's employees in the performance of the franchisee's franchised business? If so, can anything be done to mitigate this risk?

In addition to the common employer principle, a franchisor may be held vicariously liable for various claims and damages associated with the franchised business, including for personal injury, data security and privacy breaches, human rights violations and other matters arising as a result of the use of the franchisor's brand and marks in the operation of the franchised business in a manner likely to mislead third parties into believing that they are interacting with the actual franchisor. To mitigate the risk of vicarious liability, franchisors must ensure that they are not exercising direction or control over their franchisees on a day-to-day basis. Franchisors must also ensure that any third parties, including the franchisee's employees, suppliers and customers, are clearly advised that the franchisee is an independent entity from the franchisor.

11 Currency Controls and Taxation

11.1 Are there any restrictions (for example exchange control restrictions) on the payment of royalties to an overseas franchisor?

There are no such restrictions.

11.2 Are there any mandatory withholding tax requirements applicable to the payment of royalties under a trade mark licence or in respect of the transfer of technology? Can any withholding tax be avoided by structuring payments due from the franchisee to the franchisor as a management services fee rather than a royalty for the use of a trade mark or technology?

Fees and royalties paid to a franchisor that is not a resident of Canada are generally subject to a withholding tax of 25% (tax treaties may have the effect of reducing the rate to 10%). The characterisation of a payment as a service fee would not necessarily be sufficient to escape the application of withholding requirements altogether, particularly if the payment is made in consideration of the use of the trademark or technology (and could otherwise be characterised as a royalty). If a fee qualifies as a 'service fee' taxes may be avoided. However, it is crucial that such payment be related to a legitimate third-party service for an 'arm's length' fee which the franchisor provides to its franchisees (and not otherwise constitute a disguised royalty).

11.3 Are there any requirements for financial transactions, including the payment of franchise fees or royalties, to be conducted in local currency?

Nothing prevents foreign franchisors from requiring franchisees to make payments in a foreign franchisor's domestic currency. It should be noted that the Canadian *Currency Act* prevents a Canadian court from giving judgment in any currency other than Canadian currency.

12 Commercial Agency

12.1 Is there a risk that a franchisee might be treated as the franchisor's commercial agent? If so, is there anything that can be done to help mitigate this risk?

Canada does not have commercial agency laws as that term is understood in other jurisdictions. However, a franchisee may be treated as the franchisor's agent if, on an objective assessment, the franchisee is acting on behalf of the franchisor and the franchisor held out that the franchisee was authorised to do so. A franchise agreement which expressly provides that the franchisee is not the agent of the franchisor can mitigate this risk. Furthermore, franchisors should ensure that the franchisee conducts itself in a manner that reflects that it is an independent entity from the franchisor.

13 Good Faith and Fair Dealings

13.1 Is there any overriding requirement for a franchisor to deal with a franchisee in good faith and to act fairly in its dealings with franchisees according to some objective test of fairness and reasonableness?

Each of the six provincial franchise statutes imposes upon each party a duty of fair dealing in the performance and enforcement of the franchise agreement and, with the exception of Alberta, a duty to act in good faith and in accordance with reasonable commercial standards. There is also an inherent duty that the Supreme Court of Canada has determined applies to every contract: to act in an honest fashion and perform the duties as agreed upon in the agreement. The obligation includes payment of amounts owed in a timely manner, communicating promptly and responsibly with the other parties, and exercising any discretion granted to one party over the other in a reasonable fashion. This area of law continues to evolve in Canada and the courts have still not established a consistent legal test that can be applied to all contracts.

14 Ongoing Relationship Issues

14.1 Are there any specific laws regulating the relationship between franchisor and franchisee once the franchise agreement has been entered into?

Once disclosure has been made and the franchise agreement has been signed, the relationship between franchisors and franchisees is governed by general principles of contract law.

15 Franchise Renewal

15.1 What disclosure obligations apply in relation to a renewal of an existing franchise at the end of the franchise agreement term?

Where a franchise agreement is being renewed on the same terms (and no material changes have occurred), there are no additional disclosure requirements. However, if a material change in circumstances has occurred, or if the terms of the contract have changed materially, the disclosure obligations referred to above for an initial grant of a franchise apply. Best practice in Canada is to re-disclose on a renewal of a franchise agreement.

15.2 Is there any overriding right for a franchisee to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term irrespective of the wishes of the franchisor not to renew or extend?

There are no laws in Canada that provide franchisees an automatic right to renew or extend their franchise agreement. Renewal and extension rights must be set out in the franchise agreement (or otherwise agreed between the parties). In the event a renewal or extension right has been granted in a franchise agreement, the franchisor must be cautious not to deny such renewal or extension without justification.

15.3 Is a franchisee that is refused a renewal or extension of its franchise agreement entitled to any compensation or damages as a result of the non-renewal or refusal to extend?

Absent a contractual right, there is no legal obligation for a franchisor to renew or extend a franchise agreement. If such a contractual right exists, and a franchisee complies with all of the conditions of renewal or extension set out in the franchise agreement, the franchisor is not at liberty to refuse the renewal or extension. If the franchisor does so anyway, the franchisee can have the right to damages for breach of contract and/or an injunction to force the franchisor to co-operate with the renewal.

16 Franchise Migration

16.1 Is a franchisor entitled to impose restrictions on a franchisee's freedom to sell, transfer, assign or otherwise dispose of the franchised business?

In Canada, a franchisor may restrict the franchisee from assigning the franchised business under the terms of the franchise agreement with its franchisees. The typical conditions that franchisors impose on a franchisee's right to sell, transfer or assign the franchise business include obtaining the express consent of the franchisor, payment of a transfer fee, payment of all trade creditors, finalising arrangements under any lease for premises, qualifying the prospective franchisee, and providing a release to the franchisor.

16.2 If a franchisee is in breach and the franchise agreement is terminated by the franchisor, will a "step-in" right in the franchise agreement (whereby the franchisor may take over the ownership and management of the franchised business) be recognised by local law, and are there any registration requirements or other formalities that must be complied with to ensure that such a right will be enforceable?

Step-in rights in a franchise agreement will generally be recognised by Canadian law, subject to other competing interests under contractual arrangements or common law. There are no registration requirements, but appropriate notices under the franchise agreement and legislation may need to be provided as part of the step-in process. It is more advisable for franchisors to take security over the franchised business and enforce such security, or that seek a court order for such step-in rights. It should be noted that if the franchised business is insolvent, Canadian law requires that only an insolvency practitioner can be given the mandate to manage the affairs of the business.

16.3 If the franchise agreement contains a power of attorney in favour of the franchisor under which it may complete all the necessary formalities required to complete a franchise migration under pre-emption or "step-in" rights, will such a power of attorney be recognised by the courts in the country and be treated as valid? Are there any registration or other formalities that must be complied with to ensure that such a power of attorney will be valid and effective?

A properly drafted power of attorney clause in the franchise agreement given by a franchisee in favour of the franchisor will be recognised under Canadian law. The power of attorney need not be registered but local counsel in each province should be retained to ensure the power of attorney is in compliance with any specific provincial or territorial requirements.

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Ned is one of Canada's leading authorities in franchising and distribution law. He has represented some of the world's foremost franchises, and provides legal services to Canadian and International clients on all aspects of Canadian franchise law. Additionally, from 2000 to 2007, he was General Counsel to the Canadian Franchise Association and is currently a member of the International Committee of the International Franchise Association.

Ned is often called upon to lecture on the topic of franchise law and shared his knowledge and experience at law schools, franchise associations and at Canadian and US BAR associations. He is a distinguished academic author, having written numerous books and articles, as well as a frequent commenter on franchise law in the media. As a member of the Ontario Franchise Sector Working Team, Ned was instrumental in the creation of Ontario's franchise legislation and has had significant input in the franchise legislative process throughout Canada.

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Andrae's practice focuses on Franchise & Distribution law and Corporate/M&A law. He has developed particular expertise in providing seamless Canada/US cross-border legal advice through Dickinson Wright's unique North American platform to clients conducting business on both sides of the border.

Andrae frequently presents at Canadian and international franchise conferences and events, and writes for national and international journals and publications. He is an active member of various North American franchise organisations, and serves on several of their steering committees.

Andrae has been awarded the Certified Franchise Executive designation by the Institute of Certified Franchise Executives and is repeatedly named on the prestigious list of "Legal Eagles" by Franchise Times. He is also recognised in *Who's Who Legal: Franchise, The Canadian Legal Lexpert Directory* and the *Lexpert Guide to the Leading US/Canada Cross-Border Corporate Lawyers in Canada*. Andrae's literary contributions on the subject of franchise-related mergers and acquisitions have earned him the title of "Expert" by *Getting the Deal Through*.

DICKINSON WRIGHT

Dickinson Wright is one of only a few law firms with franchise lawyers in both the United States and Canada. As a law firm with more than 450 lawyers with 18 offices, we have the expertise to assist you in all matters pertaining to franchise law. Dickinson Wright also has the ability to assist franchise clients who require advice in other areas of law, such as corporate structuring, tax, employment, real estate, and intellectual property.

Dickinson Wright has extensive experience acting on behalf of franchisors, franchisees and distributors operating in North America and beyond in a wide range of industries. Our clients range from start-up systems, to regional/master franchisees, to vast franchise and distribution systems operating internationally.

We draft and review all types of legal documents specific to franchising, product and service distribution, manufacturing agreements, product licensing, and intellectual property, including trademarks and copyrights. Because of our experience acting on behalf of franchisors and franchisees, we understand the nuances of each perspective, especially when handling franchisee default and termination situations, including lease terminations, realisation on assets and security, receiverships, bankruptcy and injunctions to enforce non-competition provisions of franchise licence agreements.

We are dedicated to obtaining positive results for our clients in a way that is cost-effective and tailored to meet the particular needs and budgeting of our clients. Our team would be pleased to meet with you for a free consultation to discuss any franchise matter requiring legal assistance.

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